Syaiful Amri bin Matimbang (suing as the husband and legal dependent to Yulma bt Abdul Gafar) & Ors v Datuk Bandar Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-23NCVC-4–01 OF 2023
LEONG WAI HONG JC
13 SEPTEMBER 2023

Tort — Negligence — Maintenance of trees — Tree on private land with branches protruding out to public street fell and caused death of road user — Whether Mayor of Kuala Lumpur owed duty of care and statutory duty under Local Government Act 1976 to members of public to maintain trees which were on private land but with branches protruding out to public road or street — Whether Mayor of Kuala Lumpur owed duty of care and statutory duty under the Local Government Act 1976 to members of public to maintain trees which were wholly on private land but to which the public had right of way — Local Government Act 1976 ss 2 & 101

Yulma bt Abdul Gafar ('the deceased') was operating an ikan bakar restaurant in Kuala Lumpur ('the business premise'). She was a tenant of the landowner ie Megasas Properties Sdn Bhd. On 19 December 2021, the deceased was walking on the business premise with her family members when a huge branch from a tree fell on her head. Tragically, she died. The deceased's family sued the Mayor of Kuala Lumpur for negligence and breach of statutory duty under the Local Government Act 1976. They claimed general damages of RM1,518,060, aggravated and exemplary damages and costs. The Mayor of Kuala Lumpur filed a striking out application contending no duty of care was owed as the tree was on a private land. The issues for determination were: (a) whether the Mayor of Kuala Lumpur owed a duty of care and statutory duty under the Local Government Act 1976 to members of the public to maintain trees which were on private land but with branches protruding out to a public road or street; and (b) whether the Mayor of Kuala Lumpur owed a duty of care and statutory duty under the Local Government Act 1976 to members of the public to maintain trees which were wholly on private land but to which the public had a right of way.

Held, dismissing the striking out application:

(1) The Mayor of Kuala Lumpur owed a common law duty of care and statutory duty under the Local Government Act 1976 to members of the public to maintain trees which were on private land but with branches protruding out to a public road or street (see para 10).

(2) The rationale and decision in *Ahmad Jaafar bin Abdul Latiff v Dato Bandar Kuala Lumpur* [2014] MLJU 1873 could be extended to a tree which was wholly on private land but to which the public had access. 'Street' defined in s 2 of the Local Government Act 1976 included any road, square, footway, passage or service road, whether a thoroughfare or not, over which the public have a right of way. Section 101 read with s 2 of the Local Government Act 1976 applied to a tree wholly on a private land if the public had a right of way on that private land. Therefore, the Mayor of Kuala Lumpur owed a duty of care and statutory duty under s 101 of the Local Government Act 1976 to members of the public to maintain trees which were wholly on private land but to which the public had a right of way. This was not a suitable case to strike out the writ (see paras 12 & 17–19).

[Bahasa Malaysia summary

Yulma bt Abdul Gafar ('si mati') mengendalikan restoran ikan bakar di Kuala Lumpur ('premis perniagaan'). Si mati adalah penyewa pemilik tanah iaitu Megasas Properties Sdn Bhd. Pada 19 Disember 2021, si mati sedang berjalan di premis perniagaan bersama anggota keluarganya apabila sebatang dahan besar dari pokok jatuh di kepalanya. Malangnya, dia meninggal dunia. Keluarga si mati menyaman Datuk Bandar Kuala Lumpur kerana kecuaian dan pelanggaran kewajipan berkanun di bawah Akta Kerajaan Tempatan 1976. Mereka menuntut ganti rugi am sebanyak RM1,518,060, ganti rugi teruk dan teladan serta kos. Datuk Bandar Kuala Lumpur telah memfailkan permohonan pembatalan tuntutan dengan menyatakan bahawa tiada kewajipan berjaga-jaga yang dikenakan kerana pokok tersebut adalah di tanah persendirian. Isu-isu untuk penentuan adalah: (a) sama ada Datuk Bandar Kuala Lumpur mempunyai kewajipan berjaga-jaga dan tugas berkanun di bawah Akta Kerajaan Tempatan 1976 kepada orang awam untuk menyelenggara pokok-pokok yang berada di tanah persendirian tetapi dengan dahan yang menjulur keluar ke jalan raya atau lorong awam; dan (b) sama ada Datuk Bandar Kuala Lumpur mempunyai kewajipan berjaga-jaga dan tugas berkanun di bawah Akta Kerajaan Tempatan 1976 kepada orang awam untuk menyelenggara pokok-pokok yang sepenuhnya berada di tanah persendirian tetapi kepada mana orang awam mempunyai hak lalulalang.

Diputuskan, menolak permohonan pembatalan:

(1) Datuk Bandar Kuala Lumpur mempunyai kewajipan berjaga-jaga dan tugas berkanun undang-undang am di bawah Akta Kerajaan Tempatan 1976 kepada orang awam untuk menyelenggara pokok-pokok yang berada di tanah persendirian tetapi dengan dahan yang menjulur keluar ke jalan raya atau lorong awam (lihat perenggan 10).

(2) Rasional dan keputusan dalam kes *Ahmad Jaafar bin Abdul Latiff v Dato Bandar Kuala Lumpur* [2014] MLJU 1873 boleh diperluaskan kepada

pokok yang sepenuhnya berada di tanah persendirian tetapi kepada mana orang awam mempunyai akses. 'Jalan' yang ditakrifkan dalam s 2 Akta Kerajaan Tempatan 1976 merangkumi mana-mana jalan, dataran, laluan pejalan kaki, lorong atau jalan perkhidmatan, sama ada sebagai laluan utama atau tidak, yang mana orang awam mempunyai hak lalulalang. Seksyen 101 yang dibaca bersama s 2 Akta Kerajaan Tempatan 1976 terpakai kepada pokok yang sepenuhnya berada di tanah persendirian jika orang awam mempunyai hak lalulalang di tanah persendirian tersebut. Oleh itu, Datuk Bandar Kuala Lumpur mempunyai kewajipan berjaga-jaga dan tugas berkanun di bawah s 101 Akta Kerajaan Tempatan 1976 kepada orang awam untuk menyelenggara pokok-pokok yang sepenuhnya berada di tanah persendirian tetapi kepada mana orang awam mempunyai hak lalulalang. Ini bukan kes yang sesuai untuk membatalkan writ (lihat perenggan 12 & 17–19).]

Cases referred to

Ahmad Jaafar bin Abdul Latiff v Dato Bandar Kuala Lumpur [2014] MLJU 1873; [2014] 9 CLJ 861, CA (refd)

Legislation referred to

Local Government Act 1976 ss 2, 101
Rules of Court 2012 O 18 r 19

Raja Nur Iylia bt Raja Mohd Tajuddin (with Lina Mysarah (Pupil in Chambers)) (Raja Nur Iylia & Assoc) for the plaintiffs.
Zainol Aziz Bin Mohd (Zainol, Kiong & Azizi) for the defendant.

Leong Wai Hong JC:

INTRODUCTION

[1] There are two monsoon seasons in Malaysia. The primary rains generally fall in October and November while the secondary maximum generally falls from April to May.

[2] This year, the tropical rains started heavily in early September. It has resulted in many trees and branches falling, particularly in Kuala Lumpur, unable to withstand the forces of nature.

[3] When a tree falls on a person, it is invariably fatal. It therefore behoves Dewan Bandaraya Kuala Lumpur and all the local authorities to have a proper plan in place to cut and prune trees which fall within their jurisdiction.

[4] In the suit before me the two issues are:

A (a) does the Datuk Bandar Kuala Lumpur/The Mayor of Kuala Lumpur owe a duty of care and statutory duty under the Local Government Act 1976 to members of the public to maintain trees which are on private land but with branches protruding out to a public road or street? and

B (b) does the Datuk Bandar Kuala Lumpur/The Mayor of Kuala Lumpur owe a duty of care and statutory duty under the Local Government Act 1976 to members of the public to maintain trees which are wholly on private land but to which the public have a right of way?

C BACKGROUND FACTS

[5] The deceased one Yulma bt Abdul Gafar was operating a *ikan bakar* restaurant known as Ikan Bakar Seri Tanjung at No. 437, Lot 668, Seksyen 47, Jalan Bidor, Off Jalan Pahang, 53000 Kuala Lumpur ('business premise'). She
D was a tenant of the land owner, Megasas Properties Sdn. Bhd.

[6] The deceased on 19 December 2021 was walking on the business premise with her family members when a huge branch from a tree fell on her head. Tragically, she died.

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[7] The deceased's family sued Datuk Bandar Kuala Lumpur/The Mayor of Kuala Lumpur for negligence and breach of statutory duty under the Local Government Act 1976. They claim general damages of RM 1,518,060, aggravated and exemplary damages and costs.

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[8] Datuk Bandar Kuala Lumpur/The Mayor of Kuala Lumpur filed a striking out application under O 18 r 19 of the Rules of Court 2012. The defendant contends no duty of care is owed as the tree is on private land.

G **[9]** I had dismissed the striking out application on 25 August 2023. These are my grounds of decision.

ANALYSIS OF COURT

H *Issue 1 — Does the Datuk Bandar Kuala Lumpur/The Mayor of Kuala Lumpur owe a duty of care and statutory duty under the Local Government Act 1976 to members of the public to maintain trees which are on private land but with branches protruding out to a public road or street?*

I **[10]** In my view the Datuk Bandar Kuala Lumpur/The Mayor of Kuala Lumpur owes a common law duty of care and statutory duty under the Local Government Act 1976 to members of the public to maintain trees which are on private land but with branches protruding out to a public road or street (see *Ahmad Jaafar bin Abdul Latiff v Dato Bandar Kuala Lumpur* [2014] MLJU

1873; [2014] 9 CLJ 861 (FC)).

[11] Raus Sharif PCA in *Ahmad Jaafar bin Abdul Latiff v Dato Bandar Kuala Lumpur* [2014] MLJU 1873; [2014] 9 CLJ 861 said in clear and affirmative terms:

> [21] It is clear from the report prepared by the defendant that the fallen tree was actually from two pieces of private land which the defendant had no control over. Thus, the defendant's stance was that any mishap to the road users caused by the trees located on private land was not within their jurisdiction. With respect, I disagree. *In my considered view it does not matter that the tree was on a private land, as under the Act the defendant can require the owner or occupier of any premises to remove or trim the tree. The Act also does not prohibit the defendant from entering any private land to cut or trim trees that pose a danger to the public. The defendant should have constantly supervised and trimmed all hazardous trees, immaterial of whether the trees stood on its land or otherwise.* Section 101 of the Act clearly imposes a duty of care on the defendant, with the duty extending to the defendant to enter into private land to remove or lower or trim any tree, shrub or hedge before they cause any harm in light of the private land owner's neglect or failure to remove or trim the trees.
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> [22] Based on the aforesaid provision the obvious danger to road users brought about by the tree aligned to the highway along Jalan Duta would justify the defendant entering the private property to remedy the situation. Unfortunately, the defendant did not do so premised in the misconceived notion that it was not their business. *I find that s 101 of the Act is worded in imperative terms, leaving no room for any discretion for the local authority in the exercise of its duty. The defendant was statutorily empowered to take the appropriate action when any breach is 'likely to endanger the public safety' namely to trim the tree or to require the owner or occupier of any premises to remove, lower or trim any tree.* The words so employed in s 101(cc)(i) of the Act ie, 'likely to endanger' gives rise to the probability of the occurrence of such incident that triggers the safety standard required by the local authority to take action before harm is caused.
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> [23] *Section 101(cc)(i) is a statutory duty which imposes a responsibility on the defendant to act and ensure that public roads are kept safe from trees aligned to it.* (Emphasis added.)

Issue 2 — Does the Datuk Bandar Kuala Lumpur/The Mayor of Kuala Lumpur owe a duty of care and statutory duty under the Local Government Act 1976 to members of the public to maintain trees which are wholly on private land but to which the public have a right of way?

[12] In my view, the rationale and decision in *Ahmad Jaafar bin Abdul Latiff v Dato Bandar Kuala Lumpur* [2014] MLJU 1873; [2014] 9 CLJ 861 (CA) can be extended to a tree which is wholly on private land but to which the public has access.

[13] Section 101 of the Local Government Act 1976 reads as follows:

A In addition to any other powers conferred upon it by this Act or by any other written law *a local authority shall have power to do all or any of the following things, namely* —

...

(cc) *to require the owner or occupier of any premises to do any of the following acts:*

B (i) *to remove, lower or trim to the satisfaction of the local authority any tree, shrub* or hedge *overhanging or interfering in any way with the traffic on any road or street* or with any wires or works of the local authority or which in the opinion of the local authority is likely to endanger the public safety or convenience and in the event of any tree situated in private premises falling across any public road or street the local authority may remove the fallen tree and the expenses incurred shall be charged on and recoverable from the owner or occupier thereof; (Emphasis added.)

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[14] Road is not defined in s 2 of the Local Government Act 1976. But street is defined as follows:

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'street' includes any road, square, footway, passage or service road, whether a thoroughfare or not, *over which the public have a right of way*, and also the way over any bridge, and also includes any road, footway or passage, open court or open alley, used or intended to be used as a means of access to two or more holdings whether the public have a right of way over it or not, and all channels, drains and ditches at the side of any street shall be deemed to be part of such street. (Emphasis added.)

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[15] Therefore 'street' includes any road, square, footway, passage or service road, whether a thoroughfare or not, over which the public have a right of way. It is clear s 101 read with s 2 of the Local Government Act 1976 applies to a tree wholly on a private land if the public have a right of way on that private land.

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[16] Therefore, the Datuk Bandar Kuala Lumpur/The Mayor of Kuala Lumpur owes a duty of care and statutory duty under s 101 of the Local Government Act 1976 to members of the public to maintain trees which are wholly on private land but to which the public have a right of way.

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[17] In conclusion, this is not a suitable case to strike out the writ.

H DECISION

[18] Enclosure 8 is dismissed with costs of RM3,000 subject to allocatur.

Striking out application dismissed.

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Reported by Nabilah Syahida Abdullah Salleh